Bismark must be protected against Fargo in the same way, and interstate rates from Duluth, St. Paul and Minneapolis to Bismark must come down. Again, Billings, Mont., is a jobbing center, and part of its territory is served also by Bismark. If Bismark is protected against Fargo, Billings must be protected against Bismark. Similarly, Butte, Mont., is a jobbing center, and its territory overlaps that of Billings. If Billings is protected against Bismark by lower rates, Butte must be protected against Billings in the same way. And so on, from jobbing center to jobbing center, *ad infinitum*. Accordingly, the whole fabric of interstate rates is practically destroyed by a general reduction in rates local to a single state.

Of course this case is subject to reversal by the Supreme Court when that tribunal passes upon it, as it is quite certain to do in the course of time. But Judge Sanborn's opinion is exhaustive and painstaking, and presents arguments from which it seems difficult to escape. The case is somewhat similar in principle to that of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, where the court said: "We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce should not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States." If the principle announced by Judge Sanborn is approved by the Supreme Court, effective general control of intrastate railroad rates will be absolutely denied to the states, and the powers heretofore claimed by state railroad commissions will become largely merged in the vast jurisdiction of the Interstate Commerce Commission.

E. R. S.

CONSTITUTIONALITY OF THE NEW YORK WORKMEN'S COMPENSATION ACT.—In holding the New York Workmen's Compensation Act unconstitutional, the New York Court of Appeals has effectively put a large obstacle in the way of such legislation, not only in New York, but throughout the country. Perhaps no decision in recent months has been commented upon so much and has received so little support as this recent opinion by New York's highest court. *Ives* v. *South Buffalo Ry. Co.* (1911),—N. Y.—, 94 N. E. 431. The act presented a new question. There were no decisions bearing directly upon it. Hence, one may expect to find a long discussion of such general principles of constitutional law as are applicable to the case. And mixed with these principles there is much said on the theoretical and economic questions involved. For the economic phase of the case, see the article on *"The New York Employers' Liability Act,"* by Andrew Alexander Bruce, 9 MICH. L. REV. 684. See also the notes to that article for an extensive statement of the statute.

This statute (Article 14 a. of the N. Y. labor law) enumerates certain lines of work "each of which is determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work

therein, extraordinary risks to the life and limb of workmen engaged therein, are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen." Among these lines are the erection and demolition of bridges, operation of elevators and derricks, work on scaffolds, electrical work of certain kinds, blasting, railroad work, construction of tunnels, and work carried on under compressed air. Then in effect it goes on to say that if a workman is injured in any of these lines of work, the injury not being caused in whole or in part by the serious and willful misconduct of the workman, the employer shall be liable to pay compensation at the rates set out therein.

The plaintiff in this case was a switchman on defendant's steam railroad, and while thus engaged, was injured solely by reason of the necessary risk or danger of his employment. He brought an action under the statute to recover compensation for some five weeks during which he was incapacitated. On demurrer to the answer setting up the unconstitutionality of the statute, the Special Term and the Appellate Division sustained the act, but the Court of Appeals held it unconstitutional as depriving the employer of his property without due process of law, and as not sustainable as a proper exercise of the state's police power.

In disposing of the case many questions were necesssarily involved, some of which the court passed upon, and some it did not. Nevertheless the discussion is valuable to show where the court stands upon the different matters that will no doubt be considered in the forming and passing of a new or modified statute. The main topics discussed are: the abrogation of the fellow servant doctrine, the contributory negligence rule, assumption of risk, limitation of the number of employments covered, liability of present chartered corporations under the act, cutting off trial by jury guaranteed by the state constitution, taking of life, liberty or property without due process of law, and police power. Upon the last two of these the decision is based.

What is the meaning of "Due Process of Law?" "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him this is not due process of law." *Zeigler* v. *S. & N. Ala. R. R. Co.*, 58 Ala. 594. Certainly the industries and occupations enumerated in the statute are lawful, and certainly when one so engaged is held liable for damages without fault or negligence on his part, there is a taking of property; and so the court held it was without due process of law, and on it decided the case. But under the police power there is often a taking of property, justified on the ground that one of the necessary attributes of a civilized government is to be able to secure the general comfort, health, and prosperity of the state, even at the expense of subjecting persons and property to all kinds of burdens and restraints. If it were not for the police power, therefore, there is no

doubt that this act would be unconstitutional. Here is where the court and the supporters of the compensation act differ mainly.

What may be done under the police power? Railway companies may be forced to fence their tracks, with liability for failure to do so. *Quackenbush* v. *Wis. Ry. Co.*, 62 Wis. 411; *Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26. The legislature may regulate hours of labor, payment of cash at specified periods, protection of employes in erection of buildings, the guarding of dangerous and exposed machinery, may modify the fellow-servant doctrine, law of contributory negligence, and assumption of risk. It may do many things to conserve the health, safety, or morals of employes which increase the duties and responsibilities of the employer. *New York Cen.* v. *Williams*, — N. Y. —, 92 N. E. 404, 9 MICH. L. REV. 142; *Holden* v. *Hardy*, 169 U. S. 366; *Mo. Pac. Ry.* v. *Mackey*, 127 U. S. 205. Railway companies may be held liable for damage by fire caused directly or indirectly by engines. *St. Louis & S. F. Ry. Co.* v. *Mathews*, 165 U. S. 1; *Grissell* v. *H. R. R. Co.*, 54 Conn. 447; *Ingersoll & Quigley* v. *S. & P. Ry. Co.*, 8 Allen 438. Parties may be prohibited from receiving deposits without first obtaining a license. *Engel* v. *O'Malley*, 219 U. S. 128; *Musco* v. *United Surety Co.*, 196 N. Y. 459. And a state may regulate banking by assessing banks on the average daily deposits to create a depositor's fund. *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186. Said the court in that case, "It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *U. S.*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."

What cannot be done under this power? A railroad company was held not liable under a statute which provided that "every railroad company running cars within this state shall be liable for all expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." It was a taking without due process of law. *Ohio & Miss. Ry. Co.* v. *Lackey*, 78 Ill. 55. So also a statute which imposes absolute liability for killing or injuring stock on the railroad right of way is void as it is a taking without due process of law. *Jensen* v. *U. P. R. Co.*, 6 Utah 253; *Zeigler* v. *S. & N. A. R. Co.*, 58 Ala. 594; *Bielenberg* v. *Mont. U. Ry. Co.*, 8 Mont. 271; *Schenck* v. *U. P. R. Co.*, 5 Wyo. 430; *Cateril* v. *U. P. R. Co.*, 2 Idaho 540. An act making it a misdemeanor to manufacture cigars in certain tenements was held void. In *Matter of Jacobs*, 98 N. Y. 98. An act prohibiting the manufacture of oleomargarine was condemned because it interfered with a lawful industry, not injurious to the public and not fraudulently conducted. *People* v. *Marx*, 99 N. Y. 377. But if fraud is involved, the statute may be upheld. *People* v. *Arensberg*, 105 N. Y. 123. Similar statutes which in effect protect only private rights, or invade private rights that are lawful, are held void because not designed for the protection of public health, welfare,

morals, or comfort. *People* v .*Gillson,* 109 N. Y. 389; *Colon* v. *Lisk,* 153 N. Y. 188; *People* v. *Hawkins,* 157 N. Y. 1; *People* v. *O. C. Road Con. Co.,* 175 N. Y. 84.

Innumerable examples might be given. The vital question always is, Is it a reasonable exercise of the power? In the principal case, the question is, Is the act a reasonable regulation of the status of employment? The New York Court holds it is not, because it creates a liability when the party has omitted no legal duty, and has committed no wrong, and because it is not a reasonable exercise of the police power in order to secure general comfort, health, and prosperity of the state. The court refused to allow the Supreme Court decision in the Noble Bank case to determine their interpretation of their own constitution, even though it clearly requires bankers to give over property without having done wrong or omitted a legal duty. It would seem that the United States Supreme Court would have sustained the act.

It has been suggested that there is no difference between the abrogation of the fellow-servant doctrine and the liability of the employer for an accident which is due to the risk inherent to the trade, for where the employer has used all possible care in selecting and supervising his servant, the negligence of that servant resulting in an injury to another servant, is, as far as the employer is concerned, as much an accident as any other accident resulting from imperfections in his machinery or plant which the employer can by no possible care avoid. Conceding that the legislature may abrogate the defense both of common employment and of contributory negligence, it is an inconsistency to hold that the legislature cannot create the liability which was proposed to be created by the act. W W. M.

MUST A PASSENGER GO ON THE SAME TRAIN WITH HIS BAGGAGE?—Does a carrier assume the liability of an insurer with the excepted risks, as to baggage which a passenger checks but does not intend to accompany on the same train? The older authorities are to the effect that it does not. The contrary view is taken by a recent New Jersey case, the facts of which are briefly as follows:

P. bought a ticket between two points on D.'s line about noon on a certain day and checked at once her suit case containing personal apparel. However, she did not commence her journey until that evening and her baggage preceded her on another train. The suit case disappeared and she sued for its value. The railroad company defends upon the ground that the plaintiff did not accompany her baggage on the same train. *Held,* the liability of a railway company as a carrier of baggage is not affected by the fact of the passenger going on a later train than that carrying the baggage. *Larned* v. *Central R. Co.* (1911), — N. J. L. —, 79 Atl. 289.

In deciding the above case, the court said: "We are unable to accede to the view that, because the plaintiff did not accompany her baggage, the relation was not originally that of carrier and passenger, so to charge the company as a carrier of baggage. It is true that many of the older authorities so hold, but the methods of railroad companies in the transportation of